93-411

CAUSE NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
_____ TERM

GEORGE A. SCHLOEGEL AND THE
HANCOCK BANK PROFIT SHARING PLAN

PLAINTIFFS/PETITIONERS

VERSUS

LAURIE BOSWELL

DEFENDANT/RESPONDENT

VERSUS

HANCOCK BANK, CHARLES EASTLAND,
MARTHA PETERMAN, AND JOHN DOES
1 THROUGH 10

THIRD PARTY DEFENDANTS/PETITIONERS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is *Mertens v. Hewitt Associates*, ____ U.S. _____; 124 L.Ed.2d 161, 174 (1993) an absolute bar to all claims for monetary damages by participants in ERISA qualified retirement plans against professional advisors, regardless of the nature of the advisor's relationship with the retirement plan?

2. If not, what standard of proof must an ERISA retirement plan participant meet in order to establish that a professional advisor to such plan has crossed the line from an advisor to ERISA "fiduciary" status, either as the result of the nature and extent of the advisor's authority or control with respect to the management or administration of such plan or the advisor's degree of control regarding its assets?

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THIRD PARTY DEFENDANTS/PETITIONERS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order the Judges of this Court may evaluate possible disqualification or recusal.

1. George A. Schloegel, Plaintiff.

2. The Hancock Bank Profit Sharing, Plaintiff.

3. Hancock Bank, Third Party Defendant.

4. Charles Eastland, Third Party Defendant.

5. Martha Peterman, Third Party Defendant.

6. Laurie Boswell, Defendant.

7. William V. Westbrook, III, Attorney for George A. Schloegel, The Hancock Bank, Charles Eastland, and Martha Peterman.

8. Todd A. Rossi, Attorney for the Hancock Bank Profit Sharing Plan, The Hancock Bank, Charles Eastland and Martha Peterman.

9. James O. Dukes, Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, Attorney for Laurie Boswell.

10. Jerry Blouin, Attorney for Laurie Boswell.

Respectfully submitted,

EATON AND COTTRELL, P.A.

WILLIAM V. WESTBROOK, III
Attorney for Petitioners

TABLE OF AUTHORITIES

American Federation of Unions vs. Equitable Life Assurance Society,
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OFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

The official reports of opinions delivered in this case by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit, are as follows:

1. *Schloegel v. Boswell*, 751 F.Supp. 642 (S.D. M ss. 1990) (Ruling of the trial court denying Respondent Boswell's motion to dismiss on statute of limitation grounds);

2. *Schloegel v. Boswell*, 766 F.Supp. 563 (S.D. Miss. 1991) (Ruling of the trial court dismissing Respondent Boswell's third party complaint);

3. *Schloegel v. Boswell*, 800 F.Supp. 468 (S.D. Miss. 1992) (Judgment of the trial court in favor of Petitioners and against Boswell, finding Boswell liable for a loss to this ERISA qualified plan and its participant in the amount of $61,300.00, plus accrued interest, attorneys fees and expenses);

4. *Schloegel v. Boswell*, ____ F.2d ___ (No. 92-75-92 *Slip Op.* 5070, July 6, 1993) (Judgment of the United States Court of Appeals for the Fifth Circuit vacating judgment in Petitioner's favor and rendering

judgment in favor of Respondent Boswell).

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Review of this court is sought on the judgment of the United States Court of Appeals for the Fifth Circuit rendered on July 6, 1993. On August 20, 1993 the Court of Appeals entered an order staying the aforesaid judgment to and including September 14, 1993, for the purpose of affording Petitioners an opportunity to file a Petition for Writ of Certiorari with this court.

Jurisdiction of this court to reviewed the judgment in question by Writ of Certiorari is invoked pursuant to 28 U.S.C. §2101(c).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

Section 3(21)(A) of ERISA, 29 U.S.C. §1002(21)(A) provides in part that: "...a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan...."

Introduction

This Petition presents a timely and important issue which was recently recognized but not decided in *Mertens v. Hewitt Associates*, __ U.S. _____, 124 L.Ed.2d 161, 174 (1993), namely, may professional service providers be held liable for damages when they cross the line from advisor to fiduciary of an ERISA-qualified retirement plan? If so, what standard of proof must the plan participant meet in order to establish such professional advisor's ERISA "fiduciary" status?

Facts

Parties

The plaintiffs in this action are George A. Schloegel (hereinafter "Schloegel"), a resident of Gulfport, Harrison County, Mississippi, and the Hancock Bank Profit Sharing Plan (hereinafter "the Plan". The Plan, which is an ERISA qualified profit sharing plan, is maintained by Schloegel's employer, the Hancock Bank of Gulfport, Mississippi (hereinafter "the Bank"). At all relevant times, Schloegel was a qualified participant and beneficiary under the Plan.

The defendant, Laurie Boswell (hereinafter "Boswell"), is a resident

of the State of Louisiana. At all relevant times, he was licensed as an insurance agent by the State of Mississippi.

District and Appellate Court Proceedings

Schloegel and the Plan brought this lawsuit in the United States District Court for the Southern District of Mississippi, against Boswell, alleging breaches of fiduciary duties imposed by ERISA. The Plaintiffs maintain that Boswell breached his ERISA fiduciary duties by proposing and procuring with Plan assets, two life insurance policies insuring the life of Schloegel without first determining whether either investment complied with certain applicable Federal tax regulations. The Plaintiffs further allege that Boswell breached his ERISA fiduciary duties by failing to subsequently advise the Plan that its premium payments were not in compliance with Federal tax regulations from 1977 until the second policy was surrendered in 1987.

On September 20, 1990, Boswell filed a third-party complaint and counterclaim, seeking contribution or indemnification from the Plan, the Bank, and certain Plan officials.

In November 1990, the district court denied Boswell's 12(b)(6) motion

to dismiss on statute of limitations grounds. 751 F.Supp. 642. In July 1991, the district court dismissed Boswell's third-party action and counterclaim, holding that contribution and indemnification are not available under ERISA. 766 F.Supp. 563. The case proceeded to a bench trial on March 23, 1992. Following the trial, the district court entered judgment in favor of the Plaintiffs, awarding them $61,300.00 plus interest and costs. 800 F.Supp. 468.

The United States Court of Appeals for the Fifth Circuit, Reavley, Circuit Judge, disregarded the lower court's factual findings and held that Boswell lacked sufficient authority and control over Plan assets and did not render investment advice to the Plan on a regular enough basis to qualify him as a fiduciary of the plan. The judgment in favor of Schloegel and the Plan was reversed and rendered. ____ F.2d ____ (No. 92-75-92 *Slip Op.* 5070, July 6, 1993).

The Preexisting Relationship Between the Parties

Boswell was self-employed as a pension and profit sharing consultant from 1954 until his retirement in 1990. Exhibits in the form of correspondence from Boswell Company, Inc. to the Bank personnel, Plan

officials and others dated from 1970 to 1986 indicate that the Boswell held himself out as a pension and profit-sharing consultant.

In 1958, while the defendant was a salaried employee with the insurance firm of Marsh and McLennen, he sold the Bank life insurance for its pension plan. When Boswell left Marsh and MeLennen in 1963, he was allowed to take the Hancock Bank business with him. From 1963 to 1979, Boswell received up to 25% of his annual income in the form of commissions from the sale of numerous insurance policies owned by the Bank's pension plan.

It is uncontested that Boswell had a very close and unique relationship with the Bank from 1958 until the early 1980s. He was a life long personal friend of the Bank's top management, and was frequently present on the Bank's premises for extended periods. While there, he enjoyed unescorted access to non-public areas and was, in many respects, treated as if he were an employee of the Bank.

Of paramount importance is the fact that Boswell had unprecedented access to salary data of the Bank's employees--information which was of a particularly sensitive and confidential nature and otherwise

known only to a few members of top Bank management. Boswell was viewed by Schloegel, Martha Peterman, the Plan's Administrator (hereinafter "Peterman"), Charles Eastland, the Plan's Trustee (hereinafter "Eastland") and others at the bank as the Bank's expert on insurance and retirement matters. Schloegel, a 35-year employee of the Bank, and now President, testified that Boswell was an insider with Hancock Bank with information and privileges which exceeded those of anyone with the possible exception of Leo Seal, Jr. (Chairman of the Board). Schloegel further stated that the Bank leadership had absolute confidence in Boswell's recommendations.

From 1975 through 1984, Boswell was paid $200.00 per month for consultation services. He contended that this fee was limited to consultation on the Bank's ERISA qualified employee welfare medical plan. Schloegel and others testified (and records of payments to Boswell show) that this fee was for all professional services rendered by Boswell, including advice and assistance to the Plan. No written memorandum exists which supports the limitation suggested by Boswell.

In 1979, when the pension plan was changed, Boswell ceased

receiving commissions in connections with insurance purchased by that plan. This resulted in a marked reduction in the income Boswell received from his association with the Bank. According to his testimony, the Boswell "was [then]asked to give [the Bank] advice on things other than pension, profit sharing and group, in which I was already being paid." (Transcript-hereafter abbreviated "TR", at 85). Negotiations with Schloegel and Peterman resulted in Boswell being authorized to receive an additional $250.00 per day plus expenses.

In 1976, Boswell recommended changes needed to bring the Bank's pension plan into compliance with new legal requirements of ERISA. At the same time, he also provided a list of similar changes that would be required for the profit sharing plan to that Plan's Trustee, Eastland.

The Events Giving Rise to This Litigation
The Investments in Question

In 1977, Boswell proposed to several members of the Bank's top management, including Schloegel, that it would be to their benefit to allocate profit-sharing funds allocated to their personal accounts to purchase life insurance policies selected and procured by Boswell, and to be owned by the Plan. This proposal was made without prior notice to, or consultation

with the Plan's Administrator or Trustee. No Plan official was present for, or aware of Boswell's proposal. Purchasing of life insurance through the Plan trust account was characterized by Boswell as the cheapest way to buy life insurance in that it is paid with before tax dollars, with the insured being only responsible for personal income tax liability on PS-58 costs (the value attributed to term life protection). Another advantage pointed out was third-party ownership which precludes the proceeds from going into the insured's estate in the event that he names anyone other than his estate as beneficiary.

Boswell followed up by meeting privately with Schloegel, where he made a specific written proposal that the Plan should purchase a certain New England Life Insurance policy insuring the life of Schloegel. Boswell did not identify himself as a New England Life agent, nor did he disclose to Schloegel that he would receive a substantial commission if the policy was purchased. Once again, Boswell did not notify or consult with Plan officials prior to making this proposal, nor did he provide the Plan with a copy of, or any information about his proposal. Schloegel accepted Boswell's recommendation and agreed that the policy should be acquired.

Again without notice to Plan officials, Boswell then took all necessary steps to apply for and procure the policy. The Plan first became aware of the results of Boswell's activities when Trustee Eastland received and initial premium statement. Not knowing what this was for, Eastland called Schloegel, who told him that the premium was for a life insurance policy obtained by Boswell. By this time the transaction had taken place. Not being personally versed in insurance matters and in total reliance on Boswell's decision to enter the transaction as the Bank's insurance expert, Eastland approved the payment of the policy premiums from Schloegel's Plan account. Eastland was not advised that Boswell would receive a commission on this sale and was not then aware that such a commission was paid. As a result, the Plan acquired a New England Life Insurance Company policy on Schloegel's life, effective August 21, 1977. The policy had a face amount of $200,000.00 with an annual premium of $4,417.00. Of this premium, Boswell received commissions equivalent to 50 or 55 percent of the first year premium and 5 percent per year for the period that the policy was in force.

The New England policy remained in effect from 1977 until 1980

with all premiums being paid out of Schloegel's Plan account.

On May 6, 1980, in response to an inquiry from Eastland regarding the wisdom of purchasing ordinary life insurance in a profit sharing plan, Robert W. Dowd of the consulting firm of Stevens & Associates of Jackson, Mississippi, wrote to Eastland. While advising against the purchase of term insurance, Mr. Dowd approved of the purchase of insurance. He also added an unsolicited comment that "the premium ... must be less than 50% of aggregate employer contributions to a participant's account."

According to Peterman's testimony in reference to a letter to her from Robert W. Dowd dated August 28, 1980, it appears that she also had notice of the 50% limitation.

On July 31, 1980, in response to concerns expressed by Schloegel, Peterman wrote to Boswell for his advice regarding whether to keep the New England policy or to "just keep the money in the Profit Sharing".

On September 5, 1980, Schloegel personally wrote Boswell regarding his insurance needs in general and particularly requesting an analysis of the New England policy emphasizing its necessity and cost. Apparently, the

fact that Boswell wrote a considerable amount of insurance for New England caused some concern that there might exist a conflict.

Boswell responded to the aforestated inquiry in part by procuring the surrender of the New England policy and the purchase of a replacement policy from Massachusetts Mutual Life Insurance Company (hereinafter "Massachusetts policy"). The Massachusetts policy was also for the face amount of $200,000.00, but at an annual premium of $3,800.00.

Effective December 17, 1980, the Massachusetts policy was purchased with funds from Schloegel's account in the Bank's profit sharing plan. Boswell also was paid commissions on the Massachusetts policy of approximately 50 or 55 percent of the first year's premium and 5 percent of subsequent years' premiums.

Violation of Federal Tax Regulations

At all relevant times, applicable federal income tax regulations provided that ordinary life insurance could be purchased without adverse tax consequences to ERISA qualified profit sharing plans only if less than 50 percent of the employer's contributions to the participant's profit sharing account were used to pay the premiums. This is referred to as the

"50% Rule." Other federal income tax regulations limited a plan sponsor's contributions to 15% of a profit sharing plan participant's annual salary. Violations of these regulations carry severe penalties, including possible disallowance of tax deductions to the plan sponsor.

In calculating the premium structure for both the New England Life and Massachusetts Mutual policies, Boswell merely assumed without conducting an investigation or having any other factual basis for doing so, that the Bank had historically made profit sharing plan contributions equal to the 15% limit and would continue doing so for the twenty plus years that the policies were intended to remain in effect. In fact, however, the Bank's actual Plan contributions had always been much lower than the 15% cap and remained at a much lower level at all relevant times. As a result, the premium structures for the policies selected and procured by Boswell were far too high to be funded by the balance allocated to Schloegel's account.

Boswell admitted that he was aware of the 50% Rule and its penalties at the time of the initial proposal, as well as afterward; however, he did not recall discussing the rule at any time with Schloegel, the Plan officials

or with other Bank personnel, or warning them in any way of the serious threat a violation might present to all Plan participants.

In 1987, Schloegel, concerned about Boswell's apparent conflict of interest when he sold both insurance policies while serving as the Bank's insurance consultant, requested that Peterman check into the matter. In response, and with the assistance of Eastland, it was discovered that there was a violation of the 50% rule.

Peterman telephoned Boswell after meeting with Schloegel regarding the problem and upon hearing nothing from him after several months, wrote to him. Her letter of July 8, 1987, set out the particulars of the problem noting, in part, that the ratio of the premiums paid to total employer contributions for Schloegel's account was equivalent to 106%. The letter closes with a request for a written solution within two weeks of the date of the letter.

Boswell met with Ms. Peterman and Mr. Eastland on July 22, 1987, to discuss possible solutions to the problem. The solutions proposed by Boswell were not satisfactory to Eastland and Peterman and the decision was made to take the cash surrender value of the Massachusetts policy and

put it back into the Plan. As a result, the Plan suffered a loss of $61,300, after crediting Schloegel's account for the policy's cash surrender value.

The plaintiffs demanded restitution by Boswell which was not forthcoming. This action followed.

Argument

Did the Fifth Circuit Substitute Its Own Fact Finding and Employ an Improper Legal Test To Reverse the District Court's Finding That Boswell Was an ERISA Fiduciary Liable to Petitioners?

Introduction

The precise questions presented by this petition are: Is *Mertens v. Hewitt Associates*, ___ U.S. ____; 124 L.Ed.2d 161, (1993) an absolute bar to all claims for monetary damages by participants in ERISA qualified retirement plans against professional advisors, regardless of the nature of the advisor's relationship with the retirement plan? If not, what standard of proof must an ERISA retirement plan participant meet in order to establish that a professional advisor to such plan has crossed the line from an advisor to ERISA "fiduciary" status, either as the result of the nature and extent of the advisor's authority or control with respect to the

management or administration of such plan or the advisor's degree of control regarding its assets?

ERISA imposes a "prudent man" standard of care upon anyone acting as a fiduciary with respect to an employee welfare benefit plan as defined in the Act. 29 U.S.C. Section 1104(a) (1993). A person is considered an ERISA "fiduciary" if:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. Section 1002(21)(A) (1993).

Any fiduciary who violates Section 1104(a)'s duty to act in the best interests of participants and beneficiaries or engages in prohibited transactions listed in 29 U.S.C. Section 1106 (1993) is subject to liability under 29 U.S.C. Section 1109(a) (1993). Section 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary

> which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

As recently observed by this Court in *Mertens vs Hewitt Associates, supra,* at 124 L. Ed. 2d 161, 174 (1993), the definition of "fiduciary" is an expansive one:

> ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, see 29 USC § 1002(21) (A) [29 USCS § 1002(21)(A)], thus expanding the universe of persons subject to fiduciary duties-and to damages-under § 409(a). Professional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary; must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see §§ 502(i), 29 USC § 1132(i) [29 USCS § 1132(i)]; and (assuming nonfiduciaries can be sued under § 502 (a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees. (emphasis in italics original; underscoring added).

After *Mertens*, the location of the referenced "dividing line" between "advisors" and ERISA "fiduciaries" is of critical importance to thousands of litigants nationwide. This because *Mertens* holds that ERISA has eliminated the common law's joint and several liability, for all direct and consequential damages suffered by the plan, on the part of all persons

who do not qualify as "fiduciaries" under 29 U. S. C. 1002 (21) (A). As such, relief against parties charged with fiduciary status is now an "all or nothing" proposition for plan participants.

The District Court's Finding of Fiduciary Status

The district court began its analysis of this issue at 800 F. Supp. 473 by looking to the Fifth Circuit's teachings in *American Federation of Unions vs. Equitable Life Assurance Society*, 841 F.2d 658 (5 Cir. 1988), where it is said:

> This court gives the term fiduciary a liberal construction in keeping with the remedial purpose of ERISA. *Donovan v. Mercer*, 747 F.2d 304, 309 (5th Cir. 1984). A person is a fiduciary only with respect to those portions of a plan over which he exercises discretionary authority or control. *Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corigan Enterprises*, Inc., 793 F.2d 1456, 1459-60 (5th Cir.1986) *cert. denied*,[4791 U.S. [1034], 107 S.Ct. 884, 93 L.Ed.2d 837 (1987).

Id. at 662. (emphasis added)

Continuing, the district court in the present case noted that the *American Federation of Unions* court also stated:

> [The defendant's] fiduciary status was not diminished by the trustees' final authority to grant or deny claims and approve investments. The term fiduciary includes those to whom some discretionary authority has been delegated. H.R.Conf.Rep. No.

1280, 93rd Cong., 2d Sess., reprinted in, 1974 U.S.Code Cong. & Admin.News 5038, 5103.

Id. at 663.

Against this analytical framework, the district court reasoned that Boswell, acquired a limited ERISA "fiduciary" status for the following reasons:

> It is not surprising that neither side of this controversy was able to furnish this Court with a case "on all fours" which could be dispositive as to Mr. Boswell's status. Finding one so situated as was Mr. Boswell, in today's business climate, is probably rare.
>
> Having grown up with and even gone to kindergarten with Leo Seal, Jr.-the man whose name in this jurisdiction is synonymous with Hancock Bank-during the Bank's infancy, presented Boswell with great opportunity and obligation.
>
> The exhibits and testimony before this Court presents a relationship which developed over decades to the point where Boswell enjoyed great freedoms and was accorded considerable deference because of his perceived knowledge in insurance and employee benefits.
>
> Mr. Boswell was clearly more than a mere salesman and although he may have started out as such, he did his job so well that he became what he now would deny: a person upon whom the Plan Trustee, Administrator and beneficiary relied upon in allocating Plan assets.
>
> While this Court agrees with the defendant that the phrase "to the extent" serves as a limitation on the fiduciary's status and liability in the appropriate case, such does not relieve Boswell of

his duty.

> Boswell is not being charged with lack of prudent advice with respect to investments of the Plan, as a whole. He is only being accused of mishandling a particular investment vehicle purchased in reliance upon his expertise.
>
> It is therefore, this Court's holding that under this circuit's liberal construction of fiduciary, Boswell exercised sufficient discretionary authority or control, vis-a-vis the subject policies purchased and maintained by the Plan for Schloegel's account, to justify his being found to be a fiduciary.

Id. at F. Supp. 474.

The district court, having found that Boswell was more than a mere consultant, then reasoned that Boswell breached his limited fiduciary duty based on findings that:

> 1) the premiums were based upon an expectation that the Bank's contribution to the Plan would aggregate to an amount equal to no less than 15 percent of $60,000.00 [Schloegel's 1977 annual salary] at any time;
>
> 2) at no time during the period from 1977 to 1987 did the contributions to the Plan equal or exceed 15 percent;
>
> 3) Boswell never sought or obtained any information regarding contributions nor instructed Schloegel or persons authorized to act for him or the Plan to do so; and
>
> 4) although to this Court's knowledge the IRS has not pursued the matter, it is clear that violations of the 50% Rule could have resulted in the Plan being declared unqualified.

> The defendant's erroneous and unfounded assumptions when relied upon by the plaintiffs should have been expected to result on a violation of the 50% Rule. Even if an initial good faith error could be found, Boswell's continued failure to ascertain and correct such error would clearly be contrary to the "prudent man" standard of ERISA.

Id., at 475.

The Test Applied by the Fifth Circuit

The Fifth Circuit began its analysis at Slip Op. 5075 by noting that ERISA's legislative history clearly supports what this Court recognized in *Mertens, supra,* i.e., that individuals other than named plan fiduciaries may acquire fiduciary status by effectively exercising control over plan assets:

> While the ordinary functions of consultants and advisers to employee benefit plans (other than investment advisers [which are covered in subsection (h) of the applicable statutory definition]) may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

Quoting H.R.Conf.Rep. No. 1280, 93d Cong., 2d Sess. 323, reprinted in 1974 U.S.Code Cong. & Admin.News 5038, 5103.

Continuing, the Court observed:

> Mere influence over the trustee's investment decisions, however, is not effective control over plan assets. *See American Federation of Unions*,[*supra at* 841 F.2d 664]... ("Simply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products."); *Pappas* [vs Buck Consultants, Inc.], 923 F.2d [531] at 535 [(7 Cir. 1991]... ("discretionary authority" and "discretionary control" refer to actual decision-making power, not the influence a professional may have over the decisions made by the plan trustees). To satisfy the "authority or control" element under subsection (i), the Plaintiffs must demonstrate that Boswell caused trustee Eastland to relinquish his independent discretion in investing the plan's funds and follow the course prescribed by Boswell. *See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456, 1460 (5th Cir.1986), cert. denied, 479 U.S. 1034...(1987).

Analysis under Section 1102(21)(A)(i)
De Novo Fact Finding

Without discussing the appropriate standard of review under Rule 52 (a) of the Federal Rules of Civil Procedure or pointing out which facts, if any, relied upon by the district court were "clearly erroneous," the Court of Appeals pointed to what it asserted to be three "undisputed" facts which convinced it that Boswell did not have the degree of control necessary satisfy Section 1002 (21) (A) subsection (i)'s definition of fiduciary:

> First, trustee Eastland testified that he has the duty to invest the

plan's funds and that he made the ultimate decision to purchase the life insurance policies on Schloegel's life. Second, Eastland wrote to consultant Robert Dowd in 1980 to solicit his advice on whether to use profit-sharing funds to purchase life insurance. This indicates that Boswell was not usurping Eastland's investment power. Third, Boswell presented his life insurance proposal to six or seven members of the Bank's management committee, but Boswe.. only persuaded two of the members to accept his recommendation. These facts convince us that, as a matter of law, Boswell did not have the authority or control contemplated under subsection (i). Compare *Donovan v. Mercer*, 747 F.2d 304, 309 (5th Cir. 1984) ("[A] person who is repeatedly referred to as a trustee of an employee benefit plan, and who signs documents and takes actions regarding the Plan in an official capacity, is, as a matter of law, a fiduciary.....) with *American Federation of Unions*, 841 F.2d at 664 (merely proposing investments does not make an insurance company an ERISA fiduciary). Boswell well made an investment *proposal*, not an investment decision. Slip Op. at 5076.

The record does not support the first supposedly "undisputed fact". Eastland actually testified at TR 386-89, that in 1977, he was aware that Boswell was the Bank's consultant on the employee benefit plan; that Boswell was permitted special access to the personnel and trust departments; that Boswell never told him beforehand either that he was going to make a proposal that the Plan invest in life insurance or that he intended to meet and did meet with the executive committee and Schloegel for this purpose; that he was never provided with a copy of Boswell's

written proposal; that Boswell never discussed his insurance proposal with him; that he did not know Boswell was going to receive a commission or even how Boswell was compensated for his services; that he didn't sign the application for the policy, and that he was unaware that Boswell had made any presentation to Schloegel until Eastland received the first premium notice. When asked whether he discussed this transaction with Boswell or Schloegel before paying the premium, Eastland replied:

> I called George Schloegel and asked him what this premium notice was that had his name on there. And he advised me what it was. And so based on that and [because] Laurie [Boswell] had sold it to him, I paid it.
> Q. ...Why, as trustee, did you just pay the premium?
> A. Well, I paid the premium because of Laurie's [Boswell] position with the bank on employee benefits as consultant. I had no experience in insurance at all. So, to my knowledge, George did not ask Laurie to make the presentation to him. And, since Laurie made the presentation to George, then I approved the premium payment.

TR 389 (emphasis added)

Eastland repeated this explanation on cross examination:

> My position...was that since it was not discussed with me and cleared with me and he [Boswell] took it upon himself to talk with George [Schloegel], and that he [Boswell] in fact directed the account, the purchase of the life insurance policy, and I just approved that. TR 544.

As trustee, Eastland obviously wasn't asked to make, or even consulted about, this 1977 allocation of plan assets; rather, he simply was called upon--after the fact--to pay the premium due resulting from Boswell's "done deal". Thus, Eastland's testimony, in context, does not at all support the Court of Appeal's *de novo* fact finding that he made an informed "arm's length" decision, as trustee, to approve this Plan investment. Instead, it is entirely consistent with the district court's reasonable conclusion that Boswell's deliberately circumvented Eastland's position as Trustee and exercised *de facto* control over the Plan assets allocated to Schloegel's account by blatantly taking advantage of "a relationship which developed over decades to the point ... where he... enjoyed great freedoms and was afforded considerable deference because of his perceived knowledge in insurance and employee benefits." 800 F.Supp. at 474.

The second "undisputed fact" relied upon by the court of appeals is simply immaterial. As expressly found by the district court at 800 F. Supp. 470, the letter which Eastland wrote to Dowd in 1980 merely inquired generally "regarding the wisdom of purchasing ordinary life

insurance in a profit sharing plan...," and did not refer to, or seek any "second opinion" on either investment procured by Boswell.

The third "undisputed fact" relied upon by the Fifth Circuit, namely, that not all of the members of the bank's top management present acted on the basis of Boswell's 1977 group proposal is true, but immaterial. None of the top management personnel present were Plan officials. Boswell actually sold the 1977 policy to directly to Schloegel in a subsequent "one on one" private meeting with Schloegel. No one representing the Plan was present at this private meeting, either. No Plan official knew anything about Boswell's direct approach to Schloegel until after Boswell had personally taken and submitted Schloegel's application and already obtained the first policy. The 1977 presentation obviously had no influence whatsoever on Boswell's role in the procurement of the second policy in 1980. No group proposal was made in 1980. Instead, the second policy was procured by Boswell in direct response to correspondence from the Plan and Schloegel evidencing their total reliance on Boswell to direct and implement this investment.

In *Anderson vs Bessemer City*, 470 U.S. 564 (1985) this Court

made it quite clear that the "clearly erroneous" standard precludes *de novo* fact finding by appellate courts:

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." .... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Id.*, at 470 U. S. 473-4 (citations omitted)

Unfortunately, the Fifth Circuit did exactly what *Anderson* prohibits: it engaged in *de novo* fact finding at Slip Op. 5076 in order to set aside the district court's finding that Boswell had, by his conduct (a fact determination), acquired limited ERISA fiduciary status. In this way, the Fifth Circuit's decision clearly and squarely "conflicts with the applicable decisions of this Court...," within the meaning of Supreme Court Rule 10 (c).

Legal Analysis

A close reading of the Fifth Circuit's legal analysis leading to the conclusion that Boswell did not acquire *de facto* ERISA fiduciary status

demonstrates that the court of appeals employed a legal standard which is inconsistent with ERISA's legislative history alluded to in *Mertens, supra.* This court should now take this opportunity to provide ERISA plans, professional consultants and the lower courts with a much needed and workable analytical framework designed to yield predictable, consistent results consistent with ERISA'S legislative history and stated goal of protecting plans and plan participants.

The Fifth Circuit cited three cases in its discussion at Slip Op. 5076. The first of these is *American Federation of Unions, supra,* which is cited, at 841 F.2d 664 ("Simply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products."), for the proposition that "[m]ere influence over the trustee's investment decisions... is not effective control over plan assets." Even Boswell's own records before the Fifth Circuit showed that he clearly recognized that he was anything but an ordinary insurance salesman when he procured the two policies in question. This is demonstrated by his handwritten memo to Plan Administrator Peterman dated in 1984, where he states:

> I have mentioned on several occasions I would damned sight rather compete with agents making presentations to the Bank, but my position as the Bank's consultant presented a conflict of interest.

Ex.D-17 (emphasis added).

This statement was made shortly after he was notified of the termination of his retainer arrangement with the Bank. As further demonstrated by Eastland's testimony quoted above, Boswell didn't simply urge the purchase of the policies in question or just attempt to influence Eastland. To the contrary--he was an insider who recognized that his position as the Bank's consultant placed him in a conflict of interest position if he attempted to sell insurance to the Plan. Nevertheless, he first confronted Eastland with the bill for exactly this type of already accomplished transaction in 1977. In 1980, Boswell was clearly delegated the decision to replace the original policy. On both occasions, Boswell was, as the district court expressly found, "a person upon whom the Plan Trustee, Administrator and beneficiary relied upon in allocating Plan assets" 800 F. Supp., at 474.

The panel next cites the Seventh Circuit's decision in *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir.1991) for the

proposition that " 'discretionary authority' and 'discretionary control' refer to actual decision-making power, not the influence a professional may have over the decisions made by the plan trustees." *Pappas* is a pleadings case which involved the dismissal of a claim against former pension plan actuaries, who allegedly concealed shortages in plan funding and discriminated in favor of one participant. The Seventh Circuit affirmed, finding that the complaint in that case described no more than that the defendants negligently performed their usual professional functions. *Id.*, at 538. The present case is clearly distinguishable on its facts. Boswell went far beyond merely advising the Plan officials to purchase the policies in question. In 1977, he intentionally bypassed both the Administrator and Trustee, and for his own gain, sold the first policy directly to Schloegel. The decision to replace this policy was delegated to Boswell as a paid consultant in 1980. He made the decision himself to procure the second policy without consulting with or advising Plan officials or offering the Plan any alternative investments.

Finally, the panel at Slip Op. 5076 seems to indicate that the situation in *Donovan v. Mercer*, 747 F.2d 304, 309 (5th Cir. 1984) is the

only kind of fact pattern which will satisfy the "effective control" test for ERISA fiduciary status.

In *Donovan*, the issue was whether Wanda Joe Mercer was an ERISA fiduciary to a retirement plan. Approximately 11 documents listing her as a trustee or plan administrator were signed by her in that capacity between 1974 and 1977. She and her co-defendant maintained that she was never in fact appointed as a trustee and that the documents so listing her were the result of clerical errors. The district court held that she wasn't a fiduciary. The Fifth Circuit disagreed, saying:

> In the present case, Wanda Jo Mercer was clearly represented as being a trustee of the Plan. A number of documents prepared over a five-year period identified Wanda Jo as a Plan trustee. Additionally, instead of having any alleged errors in these documents corrected, Wanda Jo repeatedly took actions in an official capacity as trustee. Under these facts, it would be untenable to conclude other than that Wanda Jo was a trustee with fiduciary duties to the Plan....
>
> We thus hold that a person who is repeatedly referred to as a trustee of an employee benefit plan, and who signs documents and takes actions regarding the Plan in an official capacity, is, as a matter of law, a fiduciary of the Plan under ERISA, with all appurtenant duties and responsibilities. This holding is in keeping with the congressional intent that those with fiduciary duties be clearly identified, and that the term "fiduciary" not be strictly construed. 747 F.2d, at 309.

Admittedly, there are no documents in the present case in which Boswell held himself out as a Plan administrator or trustee. However, this obviously isn't the exclusive focus or test which the drafters of ERISA envisioned:

> While the ordinary functions of consultants and advisers to employee benefit plans (other than investment advisers) may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may, because of their special expertise, in effect be exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

H.R. 1280, 93d Cong., 2d Sess. 323 (1974), *reprinted,* 3 Legislative History of the Employee Retirement Income Security Act of 1974, at 4590.(emphasis added)

Clearly, the district court in the present case employed a test which exactly tracks the above emphasized legislative history criteria:

> The exhibits and testimony before this Court presents a relationship which developed over decades to the point where Boswell enjoyed great freedoms and was accorded considerable deference because of his perceived knowledge in insurance and employee benefits.
>
> Mr. Boswell was clearly more than a mere salesman and although he may have started out as such, he did his job so well that he became what he now would deny: a person upon whom the Plan Trustee, Administrator and beneficiary relied upon in

allocating Plan assets.

800 F. Supp. 474.

It is difficult to envision how Senior District Judge Russell, who heard the evidence and is no stranger to landmark ERISA decisions[1], could have better described a situation where Boswell, "because of his special expertise...[was]...exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets," as contemplated in the legislative history. A salesman's financial interest in a recommended transaction is readily apparent to the purchaser; likewise, the biased presentation is evident from the nature of the relationship. Consultants are retained to provide advise that is in the best interest of the client; encouraging action that would result in an undisclosed pecuniary benefit is not, and should not be anticipated. Individuals that fit the typical "salesman" and "consultant" role are, and should be, protected from fiduciary liability as this Court properly held in *Mertens*. However, when a professional consultant

[1]Judge Russell is the trial court judge who correctly decided *Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311 (5 Cir.) *cert granted* 478 U.S. 1004 *rev.* 481 U.S. 41 *on remand* 821 F.2d 277 (1987).

encourages that a transaction take place, and the advisor does not disclose the biased nature of his representations and there is undisclosed financial gain, the individual has "crossed the line" and becomes a fiduciary. ERISA's intent is to protect the benefits of Plan Participants. Judge Russell properly concluded that Boswell's undisclosed biased position, his hidden interest in the sale, coupled with his long-term relationship with Bank management, created an improper conflict of interest that allowed Boswell to abuse his unique position to the detriment of the Plan and its participant.

This is the proper test leading to the correct result and this Court should so declare it.

Analysis under Section 1102(21)(A)(ii)

In the remainder of it's opinion, Slip Op. 5077-78, the Fifth Circuit attempts to reinforce the finding of non fiduciary status by reference to Department of Labor regulations at 29 C.F.R. §2510.3-21(c)(1) explaining when a person is deemed to be providing "investment advice" under subsection (ii) of 29 U.S.C. § 1002 (21) (A). By incorporating by reference the same reasons articulated to find that Boswell

was not a fiduciary under subparagraph (i), the panel finds that Boswell did not meet the requirements of 29 C.F.R. §2510.3-21(c)(1)(ii)(A). The court then found that his investment advise was not rendered "on a regular basis" (which was not otherwise defined) as required by 29 C.F.R. §2510.3-21(c)(1)(ii)(B). Thus, it was held that Boswell did not "render investment advice for a fee" within the meaning of Section 1102(21)(A)(ii)

The Fifth Circuit's construction of the first of these regulations conflicts with ERISA's legislative history discussed above. As to the second regulation, the investment advice given by Boswell in this case was "on a regular basis" in the sense that it was consistent with a the same continuing plan or design by Boswell. And, considering that it was given with regard to whole life insurance--which is not generally a regularly traded or modified investment medium in the usual sense--a lower standard of frequency for instances of advise given in this context would serve the purpose for which ERISA was enacted.

For these reasons, petitioners respectfully submit that the Fifth Circuit's construction of 29 C.F.R. § 2510.3-21(c)(1)(ii)(A) and (B) are inconsistent with ERISA's legislative history and should be corrected by

this Court.

Conclusion

Summarizing the above, this petition presents a special and important issue, which is deserving of this Court's review as contemplated by Supreme Court Rule 10 because:

1. *Mertens vs Hewitt Associates, supra,* very recently alluded to, but did not decide an issue of critical importance to petitioners and other ERISA litigants, namely, when, if ever, do professional service providers properly become liable for damages by crossing the line from advisor to ERISA fiduciary;

2. The legislative history of ERISA recognizes that there will be situations where such consultants and advisers may, because of their special expertise, in effect be exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition;

3. Applying the correct legal standard reflected in the

legislative history, the district court in this case found after a full trial that Boswell was an ERISA fiduciary because he was clearly more than a mere salesman and although he may have started out as such, he did his job so well that he became what he attempted to deny: a person upon whom the Plan Trustee, Administrator and beneficiary relied upon in allocating Plan assets;

4. The Fifth Circuit's reached the opposite conclusion by doing exactly what *Anderson, supra*, 470 U. S. 564 (1985) prohibits: it engaged in *de novo* fact finding at Slip Op. 5076 in order to set aside the district court's finding that Boswell had, by his exercise of authority and control over Plan assets allocated to Schloegel's account (a fact determination), acquired limited ERISA fiduciary status; thus, the court of appeals has rendered a decision "in conflict with the applicable decision of this Court" within the meaning of Supreme Court Rule 10(c).

5. The narrow and stringent legal test applied by the Fifth Circuit to determine ERISA fiduciary status, namely, that a plan participant has no legal remedy unless he or she can show the that the alleged fiduciary is a person who is repeatedly referred to as a trustee or

administrator of an employee benefit plan, and who signs documents and takes actions regarding the Plan in this assumed official capacity, is inconsistent with ERISA's legislative history and the remedial goal of the Act; thus, the Fifth Circuit has "spoken to [the] important question of federal law" which was recognized but not decided in *Mertens* in a way which appears to conflict with *Mertens* and should now be settled by this Court, as contemplated in Supreme Court Rule 10(c).

Accordingly, petitioners respectfully submit that this Court should now address and settle the important issue raised in *Mertens*.

Boswell did not disclose his biased position or hidden interest in either insurance policy sale. This, coupled with his long-term relationship with Bank management, created a conflict of interest that allowed Boswell to abuse his unique position to the detriment of the Plan and its participant. How can this logically be anything other than a crystal clear example of a situation where a professional advisor "exercised discretionary authority or control over the management or administration of [this] plan [and]... control regarding its assets"?

Respectfully submitted,

GEORGE SCHLOEGEL AND THE
HANCOCK BANK PROFIT
SHARING PLAN

BY: EATON AND COTTRELL, P.A.

BY: _____
WILLIAM V. WESTBROOK, III
ATTORNEY OF RECORD

APPENDIX

1. *Schloegel v. Boswell*, 800 F.Supp. 468.
2. Judgment of the 5th Circuit, dated July 6, 1993.
3. *Schloegel v. Boswell*, No. 92-7592 (5th Cir. July 6, 1993).
4. Petition for Rehearing, denied, 5th Cir., filed August 5, 1993.
5. Mandate, 5th Cir., dated August 20, 1993.

APP. 1

GEORGE A. SCHLOEGEL AND THE HANCOCK BANK PROFIT SHARING PLAN, PLAINTIFFS,

V.

LAURIE A. BOSWELL, DEFENDANT.

CIV. A. NO. S89-0330(R).

United States District Court, S.D. Mississippi, S.D.

Aug. 5, 1993

MEMORANDUM ORDER

DAN M. RUSSELL, Jr., District Judge.

This case came on for trial before this Court sitting without a jury on March 23, 1992. The parties, having submitted post-trial briefs in support of their respective positions on the issues, this Court proceeds to enter its findings of fact and conclusions of law. The action is brought for statutory damages arising under the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. Section 1001,

et seq.

Facts

The plaintiffs in this action are George A. Schloegel (hereinafter "Schloegel"), a resident of Gulfport, Harrison County, Mississippi, and the Hancock Bank Profit Sharing Plan (hereinafter "the Plan". The Plan, which is an ERISA qualified profit sharing plan, is maintained by Schloegel's employer, the Hancock Bank of Gulfport, Mississippi (hereinafter "the Bank"). At all relevant times, Schloegel was a qualified participant and beneficiary under the Plan.

The defendant, Laurie Boswell (hereinafter "Boswell"), is a resident of the State of Louisiana, and at all relevant times he was licensed as an insurance agent by the State of Mississippi.

Mr. Boswell was employed as a pension and profit sharing consultant from 1954 until his

retirement in 1990.

In 1958, while the defendant was a salaried employee with the insurance firm of Marsh and McLennen, he sold the Bank life insurance for its pension plan. When Boswell left Marsh and McLennen in 1963, he was allowed to take the Hancock Bank business with him, and from 1963 to 1979, the defendant received commissions from the insurance owned by the Bank's pension plan.

It is uncontested that Boswell had a close relationship with the Bank from 1958 until the early 1980s. He was a personal friend of the Bank's top management, and was frequently present on the Bank's premises.

Of particular importance is the fact that Boswell had ready access to salary information of the Bank's employees and was viewed by Schloegel, Martha Peterman, the Plan's Administrator, and others at the bank as an

expert on insurance and retirement matters. Mr. Schloegel, a 35-year employee of the Bank, and now President, testified that Mr. Boswell was an insider with Hancock Bank with information and privileges which exceeded those of anyone with the possible exception of Leo Seal, Jr. (Chairman of the Board). Schloegel further stated that the Bank leadership had absolute confidence in Boswell's recommendations.

Exhibits in the form of correspondence from Boswell Company, Inc. to the Bank personnel and others from 1970 to 1986 indicate that the defendant held himself out as a pension and profit-sharing consultant.

From 1975 through 1984, Boswell was paid $200.00 per month for consultation services. He contends that this fee was limited to consultation on the Bank's Provident Life Insurance medical plan; however, no written

memorandum exists which supports this limitation.

In 1979, when the pension plan was changed, Mr. Boswell ceased receiving commissions in connections with insurance purchased by that plan. According to his testimony, the defendant "was asked to give [the Bank] advice on things other than pension, profit sharing and group, in which I was already being paid." (Transcript at 85). Negotiations with Schloegel and Mrs. Peterman resulted in Boswell being authorized to receive an additional $250.00 per day plus expenses.

In 1976, Boswell recommended changes needed to bring the Bank's pension plan into compliance with new legal requirements of ERISA. He also complied with the request of Charles Eastland, Trust Officer for the Bank, that he provide a list of similar changes that

would be required for the profit sharing plan. The defendant asserts that he received no compensation for this service with respect to the Plan.

In 1977, Boswell presented a proposal to several members of the Bank's top management, including Schloegel, that it would be to their benefit to use profit-sharing funds to purchase life insurance.

Purchasing of life insurance through a trust was characterized by the defendant as the cheapest way to buy life insurance in that it is paid with before tax dollars, with the insured being only responsible for PS-58 (the value attributed to term life protection) costs. Another advantage pointed out was third-party ownership which precludes the proceeds from going into the insured's estate in the event that he names anyone other than his estate as beneficiary.

As a result of the proposal and Schloegel's approval, the Plan purchased a New England Life Insurance Company policy on Schloegel's life, effective August 21, 1977. The policy had a face amount of $200,000.00 with an annual premium of $4,417.00. Of this premium Boswell received commissions equivalent to 50 or 55 percent of the first year premium and 5 percent per year for the period that the policy was in force.

The New England policy remained in effect from 1977 until 1980 with all premiums being paid out of Schloegel's Plan account.

On May 6, 1980, in response to an inquiry from Charles Eastland regarding the wisdom of purchasing ordinary life insurance in a profit sharing plan, Robert W. Dowd of the consulting firm of Stevens & Associates of Jackson, Mississippi, wrote to Mr. Eastland.

While advising against the purchase of

term insurance, Mr. Dowd approved of the purchase of insurance and added that "the premium ... must be less than 50% of aggregate employer contributions to a participant's account."

According to Ms. Peterman's testimony in reference to a letter to her from Robert W. Dowd dated August 28, 1980, it appears that she also had notice of the 50% limitation.

On July 31, 1980, in response to concerns expressed by Schloegel, Martha Peterman wrote to Boswell for his advice regarding whether to keep the New England policy or to "just keep the money in the Profit Sharing."

On September 5, 1980, Schloegel personally wrote Boswell regarding his insurance needs in general and particularly requesting an analysis of the New England policy emphasizing its necessity and cost. Apparently, the fact that Boswell wrote a

considerable amount of insurance for New England caused some concern that there might exist a conflict.

Boswell responded to the aforestated inquiry in part by recommending that Schloegel drop the New England policy and purchase a replacement policy from Massachusetts Mutual Life Insurance Company (hereinafter "Massachusetts"). The Massachusetts policy was also for the face amount of $200,000.00, but at an annual premium of $3,800.00.

Effective December 17, 1980, the Massachusetts policy was purchased with funds from Schloegel's account in the Bank's profit sharing plan. Boswell also was paid commissions on the Massachusetts policy of approximately 50 or 55 percent of the first year's premium and 5 percent of subsequent years' premiums.

At all relevant times, applicable federal

income tax regulations provided that ordinary life insurance could be purchased without adverse tax consequences to ERISA qualified profit sharing plans only if less than 50 percent of the employer's contributions to the participant's profit sharing account were used to pay the premiums. This is referred to as the "50% Rule."

Boswell's testimony indicates that he was aware of the 50% Rule and its penalties at the time of the initial proposal, as well as afterward; however, he did not recall discussing the rule at any time with Schloegel or with other Bank personnel.

In 1987, Schloegel, apparently concerned about his decreasing profit sharing account balance, requested that Martha Peterman check into the matter. In response, and with the assistance of Charles Eastland, she gathered data and discovered that there was a violation

of the 50% rule.

Ms. Peterman telephoned Boswell after meeting with Schloegel regarding the problem and upon hearing nothing from him after several months wrote to him. Her letter of July 8, 1987, set out the particulars of the problem noting, in part, that the ratio of the premiums paid to total employer contributions for Schloegel's account was equivalent to 106%. The letter closes with a request for a written solution within two weeks of the date of the letter.

Boswell met with Ms. Peterman and Mr. Eastland on July 22, 1987, to discuss possible solutions to the problem. The solutions proposed by Boswell were not satisfactory to Eastland and Peterman and the decision was made to take the cash surrender value of the Massachusetts policy and put it back into the Plan.

The plaintiffs demanded restitution by Boswell which was not forthcoming. This action followed.

Discussion

I. Is the Plan a proper party plaintiff?

The defendant correctly asserts that ERISA only specifically provides that civil actions may be brought by the Secretary of Labor or by a participant, beneficiary, or fiduciary. See 29 U.S.C. Section 1132(a).

As observed by the United States Court of Appeals for the Fifth Circuit in American Federation of Unions v. Equitable Life Assurance Society, 841 F.2d 658, 665-666 (5th Cir.1988): The Second Circuit has held that the list of potential plaintiffs in Section 1132(a) is exclusive, see Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889, 892 (2d Cir.1983), cert. denied, 464 U.S. 845, 104

S.Ct. 148, 78 L.Ed.2d 138 (1983), while the Ninth Circuit has held that parties not listed in Section 1132(a), including unions, do have standing to sue. See, Fentron Industries, Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1304-05 (9th Cir.1982).

The court of appeals in Equitable was not called upon to and did not disturb the trial court's holding that a Health and Welfare Fund was a fiduciary. Neither the status of plans as proper parties under ERISA nor this circuit's position regarding the exclusiveness of the list in Section 1132(a) was explored.

Notwithstanding the fact that its resolution might have no significant bearing upon the fundamental issues before this Court, the defendant's objection as to capacity, if raised in a timely fashion, might have presented an interesting question of law and fact. Timeliness, however, appears lacking.

[1] The initial complaint in this action was filed in this Court on May 9, 1989. The singular plaintiff in the cause at that time was Schloegel. Of possible relevance in his answer was the defendant's fifth defense which generally alleged that the plaintiff lacked standing to assert the claim.

On May 7, 1990, the plaintiffs filed their Motion to amend and for joinder of the Plan as an additional party plaintiff. This motion was granted on aiwain 22, 1990, by United States Magistrate Judge John M. Roper. A search of the record does not indicate that the defendant amended his answer.

On the first day of the trial the parties submitted the pretrial order as a general exhibit which contained the provision that the "pleadings are amended to conform to this pretrial order." Nowhere on the pretrial order is it expressed that the Plan's status

as a proper party is in dispute.

As set out by the United States Court of Appeals for the Fifth Circuit in Morgan Guaranty Trust Co. of New York v. Blum, 649 F.2d 342, 345 (5th Cir.1981), "any party who wishes to raise an issue of the capacity of any party to sue or be sued must 'do so by specific negative averment' in the appropriate pleading or amendment or be deemed waived."

It is this Court's holding that the defendant's decision to wait until after trial to assert this objection is untimely and is grounds for and constitutes waiver.

II. Statute of Limitations

The defendant begins his brief by reasserting his argument that the plaintiffs' claims are barred in whole, or in the alternative, in part by the provisions of 29 U.S.C. Section 1113.

As observed by the defendant, this Court,

by Memorandum Order of November 30, 1990, 751 F.Supp. 642, held that 29 U.S.C. Section 1113(a)(2) did not apply in the absence of any assertion of actual or constructive knowledge by the plaintiff. This Court, therefore, looked to 29 U.S.C. Section 1113(a)(1)--the six-year provision--and found that the final premium payment in 1986 on the Massachusetts policy was the "last action" which constituted a part of the alleged breach.

At this juncture, as contrasted with the prior motion, two new issues are raised: (1) the applicability of the former subsection (a)(2)(B) and or (2) whether the plaintiffs had actual knowledge under (a)(2)--formerly (a)(2)(A).

29 U.S.C. Section 1113(a)(2)(B), which was deleted by an amendment in 1987, states in pertinent part: Section 1113(a) No action may be commenced under this chapter with respect

to a fiduciary's breach of any responsibility ... or with respect to a violation of this part, after the earlier of-- (2) three years after the earliest date (B) On which a report from which [the plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the secretary under this subchapter.

Although this Court does not question the potential applicability of the foregoing subsection, the facts before this Court would not seem to bring it into play.

The defendant does not present this Court with any specific "report" or entry therein from which the plaintiffs could have reasonably been expected to obtain knowledge of the violation charged. Arguably Form 5500 (Annual Return/Report of Employee Benefit Plan) could under other facts be such a report; however, considering the nature of

the breach, such would not seem to suffice herein.

As previously noted, the plaintiffs made inquiries regarding the advisability of using plan assets to purchase life insurance and were advised that such was proper and desirable subject to the 50% Rule being complied with.

Under different facts one might argue that Mr. Eastland and/or Ms. Peterman should have continued their search to assure that the premiums were within allowed limits. Considering, however, Boswell's access to information and the reliance he had achieved in the eyes of Bank management, such would have been an unwarranted--in the absence of hindsight--duplication of effort.

[2] In short, this Court finds that neither Schloegel nor the Plan had constructive knowledge of the violation of the

50% Rule as contemplated by 29 U.S.C. Section 1113(a)(2)(B).

Regarding 29 U.S.C. Section 1113(a)(2)(A), such clearly requires that "the plaintiff [have] actual knowledge of the breach or violation." Citing Blanton v. Anzalone, 760 F.2d 989 (9th Cir.1985), the defendant argues that the requisite knowledge is that the act occurred and not that it constituted a violation.

This Court's search of the cases which have followed Blanton reveals no widespread adoption of this extension of 1113(a)(2)(A) and that this construction seems to be lacking in this circuit, as well as most circuits. Furthermore, this Court notes that Blanton relies primarily upon United States v. Kubrick, 444 U.S. 111, 118-25, 100 S.Ct. 352, 357-61, 62 L.Ed.2d 259 (1979). Kubrick was a medical malpractice action brought under the

Federal Tort Claims Act in which the plaintiff had knowledge of his injury and delayed bringing his action until he was informed that it constituted possible malpractice. The court in Kubrick stated, in pertinent part: We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. Id. at 122, 100 S.Ct. at 359.

It was also observed by the court in

Kubrick that the purpose of limitations statutes is to insure the reasonably diligent presentation of claims.

It is this Court's finding that under the facts herein, neither of the plaintiffs had knowledge that the acts of purchasing the subject insurance policies were injurious until 1987 and that the complaint is not barred under 29 U.S.C. Section 1113.

III. Was Boswell a Fiduciary of the Plan?

The United States Court of Appeals for the Fifth Circuit in American Federation of Unions, supra, 841 F.2d 658, 662, set out the following: ERISA imposes a prudent man standard of care upon anyone acting as a fiduciary with respect to an employee welfare benefit plan as defined in the Act. 29 U.S.C. Section 1104(a) (1985). A person is considered an ERISA fiduciary if: "(i) he exercises any discretionary authority or

discretionary control respecting management of such plan or exercises of any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. Section 1002(21)(A) (1985).

The defendant relies heavily upon Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288, 292 (7th Cir.1989), which cites American Federation of Unions as support for its conclusion that in order that a person or firm to be held a fiduciary a common theme--"the authority to exercise control unilaterally over a portion of a plan's

assets, not merely to propose investments"--must be present.

This Court's reading of American Federation of Unions, particularly pages 662-63, which were emphasized by Farm King, leads it to conclude that this circuit is not inclined to be so restrictive of the term of fiduciary.

This Court notes that the court of appeals in American Federation of Unions set out as follows: This court gives the term fiduciary a liberal construction in keeping with the remedial purpose of ERISA. Donovan v. Mercer, 747 F.2d 304, 309 (5th Cir.1984). A person is a fiduciary only with respect to those portions of a plan over which he exercises discretionary authority or control. Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1459-60 (5th Cir.1986) cert.

denied, [479] U.S. [1034], 107 S.Ct. 884, 93 L.Ed.2d 837 (1987). Id. at 662.

Continuing that court also stated: [The defendant's] fiduciary status was not diminished by the trustees' final authority to grant or deny claims and approve investments. The term fiduciary includes those to whom some discretionary authority has been delegated. H.R.Conf.Rep. No. 1280, 93rd Cong., 2d Sess., reprinted in, 1974 U.S.Code Cong. & Admin.News 5038, 5103. (emphasis added) Id. at 663.

[3] It is not surprising that neither side of this controversy was able to furnish this Court with a case "on all fours" which could be dispositive as to Mr. Boswell's status. Finding one so situated as was Mr. Boswell, in today's business climate, is probably rare.

Having grown up with and even gone to kindergarten with Leo Seal, Jr.--the man whose

name in this jurisdiction is synonymous with Hancock Bank--during the Bank's infancy, presented Boswell with great opportunity and obligation.

The exhibits and testimony before this Court presents a relationship which developed over decades to the point where Boswell enjoyed great freedoms and was accorded considerable deference because of his perceived knowledge in insurance and employee benefits.

Mr. Boswell was clearly more than a mere salesman and although he may have started out as such, he did his job so well that he became what he now would deny: a person upon whom the Plan Trustee, Administrator and beneficiary relied upon in allocating Plan assets.

While this Court agrees with the defendant that the phrase "to the extent"

serves as a limitation on the fiduciary's status and liability in the appropriate case, such does not relieve Boswell of his duty.

Boswell is not being charged with lack of prudent advice with respect to investments of the Plan, as a whole. He is only being accused of mishandling a particular investment vehicle purchased in reliance upon his expertise.

It is therefore, this Court's holding that under this circuit's liberal construction of fiduciary, Boswell exercised sufficient discretionary authority or control, vis-a-vis the subject policies purchased and maintained by the Plan for Schloegel's account, to justify his being found to be a fiduciary.

IV. Did Boswell breach his fiduciary duty?

The duties of a fiduciary as set out in 29 U.S.C. Section 1104(a)(1) are, in pertinent part, as follows: Subject to sections 1103(c)

and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-- (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;....

[4] This Court finds from the record that notwithstanding his expressed feeling that Mr. Eastland was not willing to help him in such matters, Boswell could and should have obtained the necessary information regarding Plan contributions.

With the exception of the brief period in which one other employee was similarly insured, Boswell only had the responsibility of monitoring Schloegel's account and it seems undeniable that such information should have been forthcoming, had he requested it.

Interestingly, the defendant argues that the plaintiffs failed in their burden of proving that the purchase of the subject policies constituted a breach of fiduciary duty.

75 To the contrary, it is this Court"s perception that the evidence supports a finding that:

1) the premiums were based upon an expectation that the Bank"s contribution to the Plan would aggregate to an amount equal to no less than 15 percent of $60,000.00 at any time;

2) at no time during the period from 1977

to 1987 did the contributions to the Plan equal or exceed 15 percent;

3) Boswell never sought or obtained any information regarding contributions nor instructed Schloegel or persons authorized to act for him or the Plan to do so; and

4) although to this Court"s knowledge the IRS has not pursued the matter, it is clear that violations of the 50% Rule could have resulted in the Plan being declared unqualified.

The defendant's erroneous and unfounded assumptions when relied upon by the plaintiffs should have been expected to result on a violation of the 50% Rule. Even if an initial good faith error could be found, Boswell"s continued failure to ascertain and correct such error would clearly be contrary to the "prudent man" standard of ERISA.

V. Damages

29 U.S.C. Section 1109(a) provides: Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 111 of this title.

Although ERISA provides no method for calculating losses, this Court finds some measure of guidance in Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2nd Cir.1985), wherein it is stated: One appropriate remedy in cases of

breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust. Restatement (Second) of Trusts Section 205(c) (1959); see Eaves v. Penn, 587 F.2d [453] at 463 [(10th Cir.1978)].

Continuing, the court stated: In determining what the Plan would have earned had the funds been available for other Plan purposes, the district court should presume that funds would have been treated like other funds being invested during the same period in proper transactions. Where several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or

ambiguity should be resolved against them.... This is nothing more than application of the principal that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer. See Leigh v. Engle, 727 F.2d [113] at 138 [(7th Cir.1984)]; McMerty v. Herzog, 710 F.2d 429, 431 (8th Cir.1983). Id.

[5] The amount of damages in the sum of $61,300.00 (plus interest accrued on this sum since December 31, 1991) was calculated by using the actual effective rate of return paid to other Plan participants. The plaintiffs also ask for post judgment interest and costs. The plaintiffs" calculation "invested" the premiums in the year they were paid and credited the defendant with the cash value of each policy as returned.

The defendant"s principal assertion is that the plaintiffs do not provide this Court

with any method to compare life insurance with other Plan investments.

Specifically enumerating the elements of value of life insurance as (1) pure life insurance protection; (2) cash value buildup; and (3) the right to pay a guaranteed, level premium, the defendant argues that only cash value was accounted for. The defendant also asserts that the plaintiffs bear the burden of quantifying the value of the third element which would require the expertise of an actuary.

Initially, this Court notes that elements (1) and (3) are losses, if any, which were suffered by the beneficiary and as stated by the United States Supreme Court in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 141, 105 S.Ct. 3085, 3090, 87 L.Ed.2d 96 (1985). A fair contextual reading of the statute makes it abundantly

clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.

If, however, the beneficiary"s losses are to be considered, it is this Court"s opinion that the burden of establishing the existence and value of mitigating factors is upon the breaching fiduciary. See Donovan, supra.

In conclusion, this Court finds that, based upon the facts and law, the defendant, Laurie Boswell, was a fiduciary of the Plan and as such, violated his duties under the "prudent man" standard of ERISA continuously from the purchase of the initial policy until said breach was discovered by the plaintiffs in 1987. This Court further finds that the plaintiffs" damages as calculated are in accord with accepted principles.

SO ORDERED AND ADJUDGED.

APP. 2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
COURT OF APPEALS
No. 92-7592

D.C. Docket No. CAS89-0330-R

GEORGE A. SCHLOEGEL and THE HANCOCK BANK PROFIT SHARING PLAN,

Plaintiffs-Appellees,

versus

LAURIE BOSWELL,

Defendant-Third Party Plaintiff-Appellant,

versus

HANCOCK BANK, ET AL.,

Third Party Defendants-Appellees.

U.S. COURT OF APPEALS
FILED
JUL 06 1993
RICHARD E. WINDHORST, JR.
CLERK

Appeal from the United States District Court for the Southern District of Mississippi

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the District Court in this cause is reversed and the judgment is rendered in favor of Boswell.

IT IS FURTHER ORDERED that plaintiffs-appellees/third party defendants-appellees pay to defendant-third party plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JULY 6, 1993

APP. 3

George A. SCHLOEGEL and the
HANCOCK BANK PROFIT SHARING PLAN,
Plaintiffs-Appellees,
v.
Laurie BOSWELL, Defendant-
Third Party Plaintiff-Appellant,
v.
HANCOCK BANK, et al.,
Third Party Defendants-Appellees.

No. 92-7592.

United States Court of Appeals,
Fifth Circuit.

July 6, 1993.

Rehearing Denied Aug. 5, 1993.

Participant in ERISA-qualified profit sharing plan and plan brought suit for restitution against insurance agent who provided plan with consulting services, including advisability of purchasing ordinary life insurance with premiums exceeding 50 percent of employer's contributions which was in violation of federal tax regulations. The United States District Court for the Southern

District of Mississippi, Dan M. Russell, Jr., J., 800 F.Supp. 468, ruled that agent was fiduciary of plan and entered judgment in favor of participant and plan. Agent appealed. The Court of Appeals, Reavley, Circuit Judge, held that agent did not have the authority and control and did not render the regular investment advice to plan that would be necessary to make agent a fiduciary of the plan.

Reversed and rendered.

[1] PENSIONS Key 126

Federal tax regulations permit ERISA-qualified profit-sharing plan to provide death benefits as long as death benefits are incidental to primary purpose of providing retirement benefits and if less than 50 percent of employer's contributions allocated to participant's profit-sharing account is used to purchase ordinary life insurance policies on participant's life. Employee Retirement Income Security Act of 1974, s 2 et seq., 29 U.S.C.A. s 1001 et seq.

[2] PENSIONS Key 49

ERISA imposes personal liability on any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed upon ERISA fiduciaries. Employee Retirement Income Security Act of 1974, s 409(a), 29 U.S.C.A. s 1109(a).

[3] PENSIONS Key 44

To establish that consultant was an ERISA plan fiduciary by showing control over ERISA plan assets, mere influence over plan trustee's investment decisions is not effective control over ERISA plan assets. Employee Retirement Income Security Act of 1974, s 3(21)(A)(i-iii), 29 U.S.C.A. s 1002(21)(A)(i-iii).

[4] PENSIONS Key 44

To establish consultant had sufficient authority or control over ERISA plan assets to make the consultant an ERISA plan fiduciary, plaintiffs must demonstrate that consultant caused trustee of ERISA plan to relinquish trustee's independent discretion in investing plan's funds and follow course prescribed by the consultant.

Employee Retirement Income Security Act of 1974, s 3(21)(A), 29 U.S.C.A. s 1002(21)(A).

[5] PENSIONS Key 44

Consultant who advised participants in ERISA profit-sharing plan to invest in life insurance policies by using funds from their profit-sharing accounts in violation of tax regulations did not have degree of control necessary to be an ERISA plan "fiduciary" where plan's trustee made ultimate decision to purchase the policies and had solicited another consultant's advice on whether to use profit-sharing funds to purchase life insurance, and the consultant persuaded only two participants to accept his recommendation. Employee Retirement Income Security Act of 1974, s 3(21)(A)(i), 29 U.S.C.A. s 1002(21)(A)(i).

See publication Words and Phrases for other judicial constructions and definitions.

[6] PENSIONS Key 44

Consultant who had advised participants in ERISA-qualified

profit-sharing plan to purchase life insurance with funds from their profit-sharing accounts in violation of tax regulations did not have sufficient discretionary authority or control with respect to purchasing property for plan to be providing "investment advice", and thus was not an ERISA plan fiduciary, where plan's trustee made decision to purchase the policies and had solicited another consultant's advice on the issue, and the consultant persuaded only two participants to accept his recommendation. Employee Retirement Income Security Act of 1974, s 3(21)(A)(i), 29 U.S.C.A. s 1002(21)(A)(i).

See publication Words and Phrases for other judicial constructions and definitions.

[7] PENSIONS Key 44

For purposes of proving that advisor or consultant was fiduciary of ERISA- qualified plan, requirement that advisor give investment advice is satisfied if investment-type advice is rendered on regular basis to the plan pursuant to mutual agreement, arrangement, or

understanding between advisor and plan; that mutual agreement must indicate that such advice will serve as primary basis for plan's investment decisions and that advisor will render individualized investment advice on plan's particular investment needs. Employee Retirement Income Security Act of 1974, s 3(21)(A)(ii), 29 U.S.C.A. s 1002(21)(A)(ii).

[8] PENSIONS Key 44

Insurance advisor's relationship with profit-sharing plan did not deem him to be rendering "investment advice" where advice was not given to plan on regular basis and plan's trustee could only think of two times when advisor gave him investment advice; thus, the advisor was not a fiduciary to the ERISA- qualified plan. Employee Retirement Income Security Act of 1974, s 3(21)(A)(ii), 29 U.S.C.A. s 1002(21)(A)(ii).

Jerry J. Blouin, New Orleans, LA and James O. Dukes, Bryant, Colingo, Williams & Clark, Gulfport, MS, for appellant.

William V. Westbrook, III, Gulfport, MS, for Schloegel.

Todd A. Rossi, Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, Baton Rouge, LA, for Hancock Bank, et al.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

The issue here is fiduciary relationship under the Employee Retirement Income Security Act (ERISA). The district court found Laurie C. Boswell to have been a plan fiduciary; we hold that he was not.

The Hancock Bank Profit Sharing Plan (Profit Sharing Plan) purchased two consecutive ordinary life insurance policies insuring the life of a plan participant, George A. Schloegel. Laurie C. Boswell procured the policies and received commissions on the premiums. The Profit Sharing Plan paid insurance premiums from

1977 to 1987, using funds from Schloegel's profit-sharing account. In 1987, the Profit Sharing Plan discovered that its payments of insurance premiums violated federal tax regulations requiring life insurance protection to be "incidental" to a qualified profit sharing plan. Faced with the possibility of losing its tax-deferred status as a profit sharing plan, the Profit Sharing Plan canceled the insurance policy and placed the cash surrender value into Schloegel's profit-sharing account.

The Profit Sharing Plan and Schloegel (collectively the Plaintiffs) sued Boswell for breach of fiduciary duties imposed by ERISA. Although the Profit Sharing Plan has not lost its tax-deferred status, the Plaintiffs claim that they suffered a $63,300 loss due to the imprudent investment in life insurance. Following a bench trial, the district court entered judgment for the Plaintiffs. 800 F.Supp. 468. We reverse on the ground that Boswell was not an ERISA fiduciary of the Profit Sharing Plan.

I. BACKGROUND

Hancock Bank of Gulfport, Mississippi (the Bank) maintains an ERISA defined benefit pension plan (the Pension Plan) and the Profit Sharing Plan for its employees. See 29 U.S.C. s 1002(2)(A). Although this lawsuit concerns only the investments of the Profit Sharing Plan, a discussion of the Pension Plan is necessary to explain Boswell's relationship with the Bank.

The Profit Sharing Plan is a "defined contribution plan," which means that the employee's benefits depend upon the amount the employer contributes to each participant's individual account. See 29 U.S.C. s 1002(34). By contrast, the Pension Plan is a "defined benefit pension plan," which means that the employee is entitled to a fixed periodic payment upon retirement. See 29 U.S.C. s 1002(35).

The Bank's on trust department serves as trustee for both the Pension Plan and the Profit Sharing Plan. Charles L. Eastland, a trust officer within the Bank's trust department, has been responsible for performing the trustee functions for both plans

since 1975. Martha Peterman, the Bank's personnel director, has served as the plan administrator for both plans since 1979.

Before his retirement in 1990, Boswell was a pension and profit-sharing consultant and an insurance broker. Although Boswell was never an employee of the Bank, he worked closely with the Bank from 1958 until the early 1980s as a consultant and an insurance broker.

A. Boswell's Consultations--Other Than Profit Sharing Plan

In 1958, Boswell assisted the Bank in establishing the Pension Plan. He sold life insurance to the Pension Plan and received commissions on the premiums from 1963 to 1979. Boswell regularly advised the Pension Plan until 1979, when the Pension Plan eliminated life insurance protection.

From 1975 to 1984, Boswell also regularly advised the Bank's Group Health Plan, which provided group term life insurance. During this time, the Bank paid Boswell $200 per month as a retainer fee. The parties dispute whether this retainer

fee was exclusively for advising the Group Health Plan. No written agreement exists describing the scope of Boswell's services.

From August 1980 to December 1982, the Bank paid Boswell an additional hourly consulting fee. According to Boswell, this fee covered consulting work on the Bank's insurance matters unrelated to either the Pension Plan or the Group Health Plan. Pursuant to this arrangement, Boswell submitted to the Bank itemized statements of his services. Upon examining Boswell's itemized statements, we have found only a few charges that could possibly be attributed to the Profit Sharing Plan.

B. Boswell's Consultations--Profit Sharing Plan

The record demonstrates that Boswell had a much more limited role with respect to the Profit Sharing Plan than he did with respect to the Pension Plan and the Bank's Group Health Plan. At trial, Peterman, Eastland, and Schloegel testified that Boswell served as a consultant on all three benefit plans. But when questioned more closely, these three witnesses could identify only

a few instances when Boswell advised the Profit Sharing Plan. The Plaintiffs' compilation of correspondence between Boswell and the Bank also fails to reveal a close relationship between Boswell and the Profit Sharing Plan. The parties dispute whether the Bank ever paid Boswell to advise the Profit Sharing Plan. The Plaintiffs contend that the $200 monthly retainer covered consultations on all plans, not just the Group Health Plan.

C. Profit Sharing Plan's Purchase of Life Insurance

In 1977, Leo Seal Jr., the Bank's chief executive officer and a close friend of Boswell, permitted Boswell to approach the Bank's senior executives with a proposal for them to use assets from their profit-sharing accounts to purchase life insurance. Boswell presented his proposal during a Bank management committee meeting to approximately six or seven senior executives, including Schloegel, who was then an executive vice president of the Bank. Neither the trustee nor the administrator of the Profit Sharing Plan attended this meeting. Boswell explained to the

executives that purchasing life insurance through their individual profit-sharing account was a cheap way to buy life insurance since the premiums would be paid using before-tax dollars.

After the presentation, Schloegel expressed an interest in Boswell's recommendation and asked the Profit Sharing Plan to purchase life insurance for his individual profit-sharing account. Based upon Boswell's recommendation to Schloegel and Schloegel's interest, trustee Eastland made the final decision to purchase the lie insurance with funds from Schloegel's individual profit- sharing account. The Profit Sharing Plan purchased a New England Life Insurance Company (New England Life) policy on Schloegel's life, effective August 21, 1977. Boswell, as the procuring agent, received a commission from New England Life each year the Profit Sharing Plan paid the premiums. Eastland testified that he was unaware that Boswell was receiving commissions on the premiums paid by the Profit Sharing Plan. In addition to Schloegel, one other member of the management

committee, Walter Hinkle, followed Boswell's life insurance advice. As with Schloegel, the Profit Sharing Plan purchased life insurance with funds from Hinkle's profit-sharing account. The Profit Sharing Plan canceled the policy on Hinkle's life a few years later, but the record does not reveal why.

In 1980, Schloegel, Peterman, and Eastland began questioning the wisdom of purchasing life insurance with profit-sharing funds. Both Eastland and Peterman solicited advice from another insurance consultant, Robert W. Dowd, who advised them that purchasing ordinary life insurance in a profit sharing plan is advantageous to executives with life insurance needs.

Also in 1980, Peterman wrote Boswell, asking him to advise Schloegel on whether to cancel the New England Life policy. Schloegel personally wrote Boswell regarding his insurance needs in general, and inquired whether the New England Life policy was the best policy for him. In response to Schloegel's letter, Boswell recommended cancellation of the New England Life

policy and purchase of a Massachusetts Mutual Life Insurance Company (Massachusetts Mutual) replacement policy, which had a lower premium.

Based on Schloegel's acceptance of Boswell's recommendation, trustee Eastland purchased the Massachusetts Mutual replacement policy with funds from Schloegel's profit-sharing account. As the procuring agent,Boswell received commissions from Massachusetts Mutual. The Profit Sharing Plan paid premiums through 1986. In 1987, Peterman and Eastland discovered that the Profit Sharing Plan's payment of Schloegel's premiums violated the federal tax regulation governing the amount of life insurance that a qualified profit sharing plan may purchase.

D. Violation of Federal Tax Regulations

[1] Federal tax regulations permit a qualified profit sharing plan to provide death benefits to plan participants as long as the death benefits are "incidental" to the primary purpose of providing retirement benefits (the incidental-death-benefit rule). Treas.Reg.

s 1.401-1(b)(1)(ii). A profit sharing plan can satisfy the incidental-death-benefit rule if less than 50 percent of the employer's contributions (and forfeitures) allocated to the participant's profit-sharing account are used to purchase ordinary life insurance policies on the participant's life (the 50-percent test). See Rev.Rul. 74-307, 1974-2 C.B. 126; Rev.Rul. 54-51, 1954-1 C.B. 147, as modified by Rev.Rul. 57-213, 1957-1 C.B. 157.

In 1987, Peterman and Eastland analyzed Schloegel's profit sharing account and discovered that the Profit-Sharing Plan's payments of the insurance premiums failed to meet the 50-percent test. Both Peterman and Eastland claim that, prior to their discovery, they were not concerned about violating the incidental-death-benefit rule because they relied on Boswell's expertise.

Once the violation was discovered, Peterman and Eastland feared that this violation would disqualify the entire Profit Sharing Plan from its tax-deferred status. In an attempt to rectify the

problem, Eastland canceled the Massachusetts Mutual policy and placed the cash surrender value into Schloegel's profit-sharing account. The Internal Revenue Service has not sought any tax deficiencies from any of the plan participants.

E. District Court Proceedings

Schloegel and the Profit Sharing Plan brought this lawsuit against Boswell, alleging breaches of fiduciary duties imposed by ERISA. The Plaintiffs claim that Boswell breached his ERISA fiduciary duties by recommending or inducing the Profit Sharing Plan to purchase the New England Life policy and the Massachusetts Mutual policy without first determining whether the 50-percent test could be met. The Plaintiffs further allege that Boswell breached his ERISA fiduciary duties by failing to subsequently advise the Profit Sharing Plan that its premium payments were not satisfying the 50- percent test.

On September 20, 1990, Boswell filed a third-party complaint and counterclaim, seeking contribution or

indemnification from the Profit Sharing Plan, the Bank, Eastland, and Peterman.

In November 1990, the district court denied Boswell's 12(b)(6) motion to dismiss on statute of limitations grounds. 751 F.Supp. 642. In July 1991, the district court dismissed Boswell's third-party action and counterclaim, holding that contribution and indemnification are not available under ERISA. 766 F.Supp. 563. The case proceeded to a bench trial. Following the trial, the district court entered judgment in favor of the Plaintiffs, awarding them $63,300.00 plus interest and costs. 800 F.Supp. 468.

II. ANALYSIS

On appeal, Boswell argues, inter alia, that he was not an ERISA fiduciary of the Profit Sharing Plan.

[2] ERISA imposes personal liability on "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon [ERISA] fiduciaries." 29 U.S.C. s 1109(a). A person is a "fiduciary" with

respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (i) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Id. s 1002(21)(A).

In holding that Boswell was a fiduciary, the district court noted that Boswell had become "a person upon whom the Plan Trustee, Administrator and beneficiary relied ... in allocating Plan assets." 800 F.Supp. at 474. The court concluded that "Boswell exercised sufficient discretionary authority or control, vis-a-vis the subject policies purchased and maintained by the Plan for Schloegel's account, to justify his being found to be a fiduciary." Id. Although not completely clear, it appears the district court

relied only on subsection (i) of 29 U.S.C. s 1002(21)(A) in determining that Boswell was a fiduciary.

On appeal, the Plaintiffs contend that Boswell qualifies as a fiduciary under subsections (i) and (ii).

A. Subsection (i)--Authority or Control

The parties agree that trustee Eastland made the final decision to purchase the insurance policies on Schloegel's life. The Plaintiffs, however, contend that Boswell exercised effective control over the Profit Sharing Plan's investments by convincing it to purchase the policies. According to the Plaintiffs, trustee Eastland relied upon Boswell's expertise and long-standing relationship with the Bank when he decided to invest Schloegel's funds in life insurance. The Plaintiffs' general theory of "effective" control has support from ERISA's legislative history: While the ordinary functions of consultants and advisers to employee benefit plans (other than investment advisers [which are covered in subsection (ii) of the applicable statutory definition])

may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition. H.R.Conf.Rep. No. 1280, 93d Cong., 2d Sess. 323, reprinted in 1974 U.S.Code Cong. & Admin.News 5038, 5103. The Seventh Circuit, in Pappas v. Buck Consultants, Inc., 923 F.2d 531 (7th Cir.1991), recognized that this legislative history "seems to ... contemplate[ ] a ... fact-intensive inquiry that looks to whether the professional transcended her 'ordinary functions.' " Id. at 537; see also Mertens v. Hewitt Assoc., --- U.S. ----, ----, 113 S.Ct. 2063, 2071, --- L.Ed.2d ---- (1993) (noting that "[p]rofessional service providers such as actuaries become liable for damages when they cross the line from advisor

to fiduciary"); 29 C.F.R. s 2509.75- 5.

[3][4] Mere influence over the trustee's investment decisions, however, is not effective control over plan assets. See American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y, 841 F.2d 658, 664 (5th Cir.1988) ("Simply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products."); Pappas, 923 F.2d at 535 ("discretionary authority" and "discretionary control" refer to actual decision-making power, not the influence a professional may have over the decisions made by the plan trustees). To satisfy the "authority or control" element under subsection (i), the Plaintiffs must demonstrate that Boswell caused trustee Eastland to relinquish his independent discretion in investing the plan's funds and follow the course prescribed by Boswell. See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc., 793 F.2d 1456, 1460 (5th Cir.1986), cert. denied, 479 U.S. 1034, 107 S.Ct.

884, 93 L.Ed.2d 837 (1987).

[5] We rely on the following undisputed facts to conclude that Boswell did not have the degree of control necessary to satisfy the subsection (i) definition of fiduciary. First, trustee Eastland testified that he has the duty to invest the plan's funds and that he made the ultimate decision to purchase the life insurance policies on Schloegel's life. Second, Eastland wrote to consultant Robert Dowd in 1980 to solicit his advice on whether to use profit-sharing funds to purchase life insurance. This indicates that Boswell was not usurping Eastland's investment power. Third, Boswell presented his life insurance proposal to six or seven members of the Bank's management committee, but Boswell only persuaded two of the members to accept his recommendation. These facts convince us that, as a matter of law, Boswell did not have the authority or control contemplated under subsection (i). Compare Donovan v. Mercer, 747 F.2d 304, 309 (5th Cir.1984) ("[A] person who is repeatedly referred to as a trustee of an employee

benefit plan, and who signs documents and takes actions regarding the Plan in an official capacity, is, as a matter of law, a fiduciary....") with American Federation of Unions, 841 F.2d at 664 (merely proposing investments does not make an insurance company an ERISA fiduciary). Boswell made an investment proposal, not an investment decision.

B. Subsection (ii)--Investment Advice

The Department of Labor has adopted regulations explaining when a person is deemed to be providing "investment advice" under subsection (ii) of 29 U.S.C. s 1002(21)(A): A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of [29 U.S.C. s 1002(21)(A)(ii)], only if: (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and (ii) Such person either directly or indirectly ... (A) Has discretionary authority or control,

whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or (B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments. 29 C.F.R. s 2510.3-21(c)(1) (emphasis added) ("DOL Regulation"); see also American Federation of Unions, 841 F.2d at 664 & n. 5 (applying the DOL Regulation); Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co., 884 F.2d 288, 291-94 (7th Cir.1989) (same). The district

court below did not discuss the DOL Regulation in ruling on Boswell's fiduciary status. See 800 F.Supp. at 473-74.

Boswell does not dispute that the first requirement of the DOL Regulation is met; he made recommendations as to the advisability of purchasing life insurance. See 29 C.F.R. s 2510.3-21(c)(1)(i).

[6] The parties dispute whether the second requirement of the DOL Regulation is met. There are two ways to satisfy this second requirement. First, the second requirement is met if the person (Boswell) had "discretionary authority or control" with respect to purchasing property for the plan. See id. s 2510.3-21(c)(1)(ii)(A) ("Subpart (ii)(A)"). Subpart (ii)(A) of the DOL Regulation appears to overlap with subsection (i) of 29 U.S.C. s 1002(21)(A), which we discussed above. If a person has discretionary authority or control with respect to purchasing or selling securities or other property for the plan, that person would satisfy subsection (i) of 29 U.S.C. s 1002(21)(A) as well as satisfy

Subpart (ii)(A) of the DOL Regulation. See Olson v. E.F. Hutton & Co., 957 F.2d 622, 626 n. 4 (8th Cir.1992) (recognizing that Subpart (ii)(A) of the DOL Regulation overlaps with subsection (i) of the statutory definition). For the reasons discussed above, we hold that Boswell did not have "discretionary authority or control" with respect to the Profit Sharing Plan's purchase of the insurance policies on Schloegel's life.

We note that Subpart (ii)(A) of the DOL Regulation is narrower in scope than subsection (i) of 29 U.S.C. s 1002(21)(A). Subpart (ii)(A) of the DOL Regulation covers only discretionary authority or control with respect to purchasing or selling the plan's property.

[7] The second way of satisfying the second requirement of the DOL Regulation is by rendering investment-type advice on a regular basis to the plan pursuant to a mutual agreement, arrangement, or understanding between the advisor and the plan. That mutual agreement, arrangement, or understanding must

indicate that such advice will serve as the primary basis for the plan's investment decisions and that the advisor will render individualized investment advice based on the plan's particular investment needs. See 29 C.F.R. s 2510.3-21(c)(1)(ii)(B) ("Subpart (ii)(B)").

[8] Boswell's relationship with the Profit Sharing Plan fails to satisfy Subpart (ii)(B). Despite Eastland's, Peterman's, and Schloegel's testimony that Boswell advised the Profit Sharing Plan, the record fails to show that Boswell rendered investment-type advice to the Profit Sharing Plan on a regular basis. Aside from the advice given in 1977 and 1980 regarding the life insurance for Schloegel and other executives, Eastland could only think of one other time when Boswell gave him investment advice. In searching through the record, we found only a few instances of Boswell providing investment-type advice to the Profit Sharing Plan. Furthermore, nothing in the record shows that the Profit Sharing Plan and Boswell had a mutual arrangement or understanding that

Boswell's advice would serve as the primary basis for the plan's investment decisions. We noted earlier that only two members of the Bank's management committee followed Boswell's sales pitch. The fact that Eastland solicited Dowd's advice on the advisability of purchasing life insurance further indicates that Eastland did not exclusively rely on Boswell's advice. Eastland testified at trial that he did not "seek [Boswell] out and ask advice" but that, if Boswell approached him, he "was willing to listen." This falls far short of the type of relationship described in the DOL Regulation.

Based on the DOL Regulation and the evidence at trial, we conclude, as a matter of law, that Boswell did not render "investment advice" for purposes of subsection (ii) of 29 U.S.C. s 1002(21)(A).

III. CONCLUSION

Although Boswell worked closely with the Bank and its officers, a close examination of the relationship between Boswell and the Profit Sharing Plan reveals that Boswell was not a fiduciary

of the Profit Sharing Plan. The judgment of the district court is reversed and judgment is here rendered in favor of Boswell.

REVERSED and RENDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
U. S. COURT OF APPEALS
No. 92-7592

GEORGE A. SCHLOEGEL and THE

HANCOCK BANK PROFIT SHARING PLAN,
Plaintiffs-Appellees,

versus

LAURIE BOSWELL,

Defendant-Third Party
Plaintiff-Appellant,

versus

HANCOCK BANK, ET AL.,

Third Party
Defendants-Appellees.

U.S. COURT OF APPEALS
FILED
AUG 5 1993
RICHARD E. WINDHORST, JR.
CLERK

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING

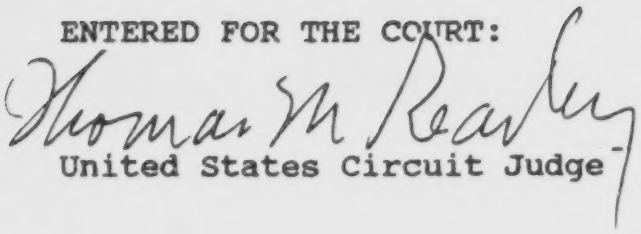
(August 5, 1993)

Before POLITZ, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby

ENTERED FOR THE COURT:



United States Circuit Judge

CLERK'S NOTE.-

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APP. 5

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

RICHARD E. WINDHORST, JR.
CLERK

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August 20, 1993

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No. 92-7592 GEORGE A. SCHLOEGEL, ET AL., -vs- LAURIE BOSWELL -vs- HANCOCK BANK, ET AL.,

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(D.C. No. CAS89-0330-R)

MANDATE STAYED TO AND INCLUDING
September 14, 1993

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only

when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

RICHARD E. WINDHORST, JR.,
Clerk

BY: P. Keller

Deputy Clerk

Enclosures

cc: Mr. James O. Dukes
Mr. Jerry J. Blouin
Mr. Todd A. Rossi

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

No. 93-411

In The

Supreme Court of the United States

October Term, 1993

GEORGE A. SCHLOEGEL AND THE HANCOCK BANK PROFIT SHARING PLAN,

Plaintiffs/Petitioners,

versus

LAURIE BOSWELL,

Defendant/Respondent,

versus

HANCOCK BANK, CHARLES EASTLAND, MARTHA PETERMAN, AND JOHN DOES 1 THROUGH 10,

Third Party Defendants/Petitioners.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's contention of a question for review under *Mertens v. Hewitt Associates*, ___ U.S. ___, 124 L.Ed.2d 161 (1993) is a specious "issue."

2. Whether the evidence was insufficient under settled legal standards to support Petitioner's claim of fiduciary status.

3. Whether the Court should expend judicial resources on a case in which the action of the Court of Appeals would also be mandated on other issues.

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No. 93-411

In The

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October Term, 1993

GEORGE A. SCHLOEGEL AND THE HANCOCK BANK PROFIT SHARING PLAN,

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HANCOCK BANK, CHARLES EASTLAND, MARTHA PETERMAN, AND JOHN DOES 1 THROUGH 10,

Third Party Defendants/Petitioners.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

RESPONSE TO PETITION FOR CERTIORARI

I.

THIS CASE DOES NOT PRESENT ANY ISSUE UNDER *MERTENS*.

The first question which Petitioner presents for review is whether *Mertens v. Hewitt Associates*, ___ U.S. ___, 124 L. Ed. 2d 161 (1993) constitutes an absolute bar to

claims for monetary damages against professional advisors to ERISA plans, regardless of the nature of the relationship between the advisor and the plan. This is a specious "issue" raised by Petitioner to create the impression of an issue appropriate for review by the Court where none exists.

Mertens did *not* leave unresolved the issue of when a professional advisor can be sued under ERISA. *Mertens* acknowledges that an advisor (or anyone else for that matter) can be sued under ERISA when he "cross[es] the line from advisor to fiduciary." ___ U.S. ___, 124 L.Ed.2d at 174.

The Fifth Circuit Court of Appeals acknowledged this holding and cited *Mertens* with approval (Slip Opinion at 5076). Respondent, too, agrees with this proposition and made no contrary argument either in the District Court or in the Court of Appeals.

II.

THE ONLY ISSUE IS THE INSUFFICIENCY OF THE EVIDENCE TO SUPPORT PETITIONER'S FIDUCIARY CLAIM

The only issue in this case is the sufficiency of the evidence to support Petitioner's claim that Respondent had "crossed the line" from advisor to fiduciary. Such an evidentiary issue on what the District Court itself described as "rare" set of facts (800 F. Supp. at 474) is not the type of issue on which this Court ordinarily grants a Writ of Certiorari. See *Layne v. Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923); *Smith v. Butler*, 366 U.S. 161 (1961).

Moreover, reviewing the record evidence as it was required to do, the Court of Appeals correctly concluded that the evidence was insufficient as a matter of law to establish a fiduciary capacity. In reviewing this issue, the Court of Appeals did not purport to make its own *de novo* findings of fact nor did it usurp the fact-finding function of the District Court. Instead, the Court of Appeals relied on *undisputed* facts. One of these critical undisputed facts was that the Plan Trustee Eastland had the duty to invest the Plan's funds and that it was Eastland who made the ultimate decision to purchase the life insurance policies in question (Slip Opinion at 5076). Petitioner's contrary argument is wholly erroneous.[1] Eastland's testimony was precisely as the Court of Appeals described it:

> Q. Who at the bank is ultimately responsible for investment decisions in the bank's profit sharing plan?
>
> A. The Trustee.
>
> Q. And who made the decision to purchase the New England Life policy in 1977?
>
> A. The ultimate decision, when I paid the premium, I did.

TR. 388.

The Court of Appeals did not, as claimed by Petitioner, adopt a test requiring that "a Plan participant has

---

[1] Petitioner agrees with two of the other undisputed facts relied upon by the Court of Appeals, i.e., that Eastland wrote to a consultant in 1980 to solicit his independent advice on whether to use profit sharing funds to purchase life insurance and that most of the bank's top management rejected Boswell's insurance proposals.

no legal remedy unless he or she can show the (sic) that the alleged fiduciary is a person who is repeatedly referred to as a trustee or administrator of an employee benefit plan, and who signs documents and takes action regarding the plan in this assumed official capacity . . . " Petition at 35-36. Rather, the Court of Appeals examined each subsection of 29 U.S.C. §1002(21)(A), which defines the term "fiduciary". The Court of Appeals applied the facts of this case, properly found,[2] separately to each subsection of the statute.[3] In so doing, the Court considered

---

[2] Petitioner creates an illusion of numerous contacts between Boswell and the profit sharing plan by intermingling throughout the Petition references to Boswell's contacts with the Bank's other insured employee benefit plans. However, as the Court of Appeals correctly gleaned from the record, Boswell's contacts with the profit sharing plan, the only plan at issue in this litigation, were minimal. Indeed, the record reflects only four such contacts in a period of more than twenty years: the sale of the policies in question in 1977 and 1980, an unsuccessful proposal for the sale of a policy in 1986, and Boswell's gratuitous response to Eastland's inquiry as to changes to the plan mandated by ERISA, made at the time Boswell had been retained to make similar changes to the pension plan.

[3] The Court of Appeals first considered the discretionary authority or control test of 29 U.S.C. §1002(21)(A)(i) upon which the District Court apparently premised its decision. Finding from the undisputed facts that "Boswell made an investment *proposal*, not an investment decision," the Court rejected fiduciary status under this subsection. (Slip Op. at 5076, emphasis in original). The Court then considered the investment advice test of 29 U.S.C. §1002(21)(A)(ii) and Department of Labor regulations, 29 C.F.R. §2501.3-21(c)(1), applicable thereto, neither of which had been considered by the District Court. Carefully analyzing the statute and regulations, the Court of Appeals concluded, as a matter of law, that Boswell did not cross the line to fiduciary status by rendering investment advice. (Slip Op. at 5076-78.)

relevant judicial authority of the Fifth Circuit Court of Appeals, of other Courts of Appeals and of the United States Supreme Court, finding them to be in harmony on all relevant points. Having conducted this thorough analysis, the Court of Appeals properly concluded that Laurie Boswell did not cross the line from advisor to fiduciary and, thus, that the District Court had erred in finding him to be an ERISA fiduciary.

III.

THIS COURT SHOULD NOT EXPEND VALUABLE JUDICIAL RESOURCES ON A CASE IN WHICH THE SAME RESULT IS MANDATED ON OTHER ISSUES

Even if the Court of Appeals had not reversed this case on the fiduciary status issue, it is clear that other issues would have required that the case be reversed and rendered. Most notably, the claims of the plaintiffs are clearly barred by ERISA's statute of limitations, 29 U.S.C. §1113, which bars claims as of the earlier of (1) six years after the date of the last action which constituted a part of the breach or violation or (2) three years after the earliest date which the plaintiff had actual knowledge of the breach or violation.

The Complaint in this case was filed on May 9, 1989. The breach or violation in this case may alternatively be argued to be either the sale of the policies of insurance in question or the payment of the insurance premium which violated the 50% rule. The policies in question were sold in 1977 and 1980. Further, the evidence in the case showed that the premium payment which brought the plan into violation of the 50% rule likewise occurred in

1980. Once this payment was made, the violation of the 50% rule was complete. It could not then be cured or mitigated by investigation, oversight or corrective action. Thus, six years later, during calendar year 1986, the claims of the plaintiffs became barred by the first subsection of 29 U.S.C. §1113. Likewise, the evidence showed that in 1980 the plan, which then possessed all applicable facts relating to the purchase of the policies, the payment of premiums and plan contributions, was specifically informed by Robert W. Dowd, an independent consultant, of the provisions of the 50% rule. Thus, in 1980, the plan had actual knowledge of the breach or violation. Three years later, during calendar year 1983, these claims were barred by the second subsection of the statute of limitations. Since the statute's bar arises upon the expiration of the *earlier* of the dates calculated under the two subsections of the statute of limitations, and since the application of *either* subsection of the statute would result in a finding that plaintiffs' claims are barred, it is clear that claims of the plaintiffs in this case are barred by the statute of limitations. *See generally, Meagher v. IAM Pension Plan,* 856 F.2d 1418 (9th Cir. 1988); *Fink v. National Savings and Trust Co.,* 772 F.2d 951 (D.C. Cir. 1985).

CONCLUSION

Respondent respectfully submits that this petition presents for review no questions of law left unresolved by *Mertens, supra* or any other applicable decision. Rather, this is simply a case in which the Court of Appeals correctly applied the undisputed facts to well-settled legal principles. This case presents no situation in which

the Court of Appeals has rendered a decision conflicting with the decision of another Court of Appeals or of the United States Supreme Court, has departed from accepted and usual course of judicial proceedings, has decided an important question of federal law which has not been but should be settled by the United States Supreme Court or which otherwise falls within the scope of matters considered by this Court under Rule 10. Respondent respectfully submits that the Petition for Writ of Certiorari should be promptly and summarily denied.

Respectfully submitted,

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October 12, 1993